A

CENTRAL CABLES BHD

v.

TAN KIM LIEN

B

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[CIVIL APPEAL NO: 11-5-2004]
18 JULY 2006

C ***CONTRACT:*** *Oral agreement - Admission - Existence of an oral admission and undertaking by defendant - Whether legally binding - Whether magistrate court had erred*

D This was an appeal by the appellant-plaintiff ('the plaintiff') against the decision of the magistrate dismissing its claim with costs. The plaintiff had sold and delivered goods to a company, Adco Sdn Bhd ('Adco') which had incurred an outstanding debt of RM379,761.21 due and owing to the plaintiff. In consideration of the sale and delivery of the goods thereof, *vide* letter of guarantee E dated 24 May 1996, the defendant as Adco's managing director, together with another person, had jointly and severally guaranteed to pay the plaintiff to the extent of RM300,000 for any outstanding account and liabilities incurred by Adco. By way of the Kuala Lumpur High Court Civil Suit No. D6-22-1878-2000 F ('the first suit'), the plaintiff claimed the sum of RM379,761.21 and RM300,000 respectively against Adco and the defendant. The plaintiff also commenced Kuala Lumpur civil suit No.D2-22-1679-2000 ('the second suit') claiming a sum of RM300,000. The second suit was based on the same cause of action in the first G suit against the defendant. With a view to an amicable settlement, the plaintiff and the defendant had a meeting ('the settlement meeting') wherein PJ Indah Sdn Bhd ('PJ Indah') of which the defendant was also the managing director had agreed to pay the plaintiff the sum of RM379,761.21 being the sum owed by Adco H to the plaintiff, together with interest claimed at 8% p.a on the sum of RM379,761.21 from 8 July 1999 to 5 January 2001 which amounted to RM45,446.49. At the settlement meeting, the defendant was alleged to have orally agreed with the plaintiff's representatives to pay a sum of RM20,000 to the plaintiff on or I before 31 December 2001, by way of settlement of the interest owed by Adco to the plaintiff. The oral agreement was allegedly recorded in five letters (collectively 'plaintiff's five letters') enclosing letters of admission and undertaking and setting out the terms of

settlement for the abovesaid two suits, pursuant to which the sum of RM379,761.21 had been paid to the plaintiff and the two suits were withdrawn, but the defendant had failed to pay the sum of RM20,000 to the plaintiff. Subsequently, the plaintiff's solicitors issued a notice of demand addressed to the defendant's address given by the defendant in the letter of guarantee. There was no response to the said notice of demand. When the plaintiff's action was dismissed by the magistrate, the plaintiff lodged this appeal. The issue that arose was whether the plaintiff succeeded in establishing the existence of an oral admission and undertaking by the defendant to pay the plaintiff the sum of RM20,000 claimed.

Held (allowing the appeal):

(1) As the evidence adduced by the parties respectively pertaining to the existence or otherwise of an oral admission and undertaking was sharply conflicting, the magistrate court should have referred to and relied on the witness' acts and deeds which were contemporaneous with the event and to draw reasonable inferences from them, adding that judicial reception of evidence required that the oral evidence be critically tested against the whole of the other evidence and circumstances of the case *(Tindok Besar Estate Sdn Bhd v. Tinjar Co, Industrial Concrete Products Bhd v. Concrete Engineering Products Bhd & Other Suits* and *Nuri Asia Sdn Bhd v. Fosis Corporation Sdn Bhd)*. However, there was no indication in the magistrate's grounds of decision that this was done. (paras 25 & 27)

(2) PJ Indah had pursuant to para 3(i) of the unexecuted letter of admission and undertaking paid the sum of RM379,761.21 which was part and parcel of the sum of RM399,761.21. From the defendant's acts and deeds, it was a reasonable and irresistible inference that the payment by PJ Indah was part and parcel of the larger package contained in the unexecuted letter of admission and undertaking which included the payment by the defendant of the balance of RM20,000 so as to treat the settlement as a whole. The defendant's admission and undertaking remained unaltered. The defendant's refusal to sign the letter of admission and undertaking meant that it was oral in nature but which was nonetheless legally binding on the defendant *(Lim Keng Siong & Anor v. Yeo Ah Tee, Sivapragasam Nagamany v. Amaravathy V Nadeson & Anor and*

A *Ace King Pte Ltd v. Circus Americano Ltd & Ors)*. The magistrate judge had erred in arriving at his decision. (paras 33 & 34)

[Decision set aside; judgment entered in terms of the plaintiff's claim.]

B **Case(s) referred to:**

Ace King Pte Ltd v. Circus Americano Ltd & Ors [1983] 2 CLJ 255; [1983] CLJ (Rep) 444 HC ***(refd)***

Industrial Concrete Products Bhd v. Concrete Engineering Products Bhd & Other Suits [2001] 8 CLJ 262 HC ***(refd)***

C *Janagi v. Ong Boon Kiat [1971] 2 MLJ 196* ***(refd)***

Lim Keng Siong & Anor v. Yeo Ah Tee [1983] 1 CLJ 233; [1983] CLJ (Rep) 231 FC ***(refd)***

MBf Finance Bhd v. Sim Peng Bee & Anor [2003] 1 CLJ 690 HC ***(refd)***

Nuri Asia Sdn Bhd v. Fosis Corporation Sdn Bhd [2006] 5 CLJ 307 HC ***(refd)***

D *Sivapragasam Nagamany v. Amaravathy V Nadeson & Anor [2001] 8 CLJ 706 HC* ***(refd)***

Tenaga Nasional Berhad v. Perwaja Steel Sdn Bhd [1995] 4 CLJ 670 HC ***(refd)***

The Chartered Bank v. Yong Chan [1974] 1 MLJ 157 ***(refd)***

E *Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 2 MLJ 229* ***(refd)***

Yew Wan Leong v Lai Kok Chye [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330 SC ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 101(1), (2)

F Rules of the High Court 1980, O. 81 r. 1(1)(a)

Other sourse(s) referred to:

Chitty on Contracts, 24th edn, vol 1, p. 102, para 100

For the plaintiff - Wong Fook Meng; M/s Chee Siah Le Kee & Partners

G *For the defendant - Gobindran Thirunavakarasu; M/s Kamarudin & Partners*

Reported by Suhainah Wahiduddin

H **JUDGMENT**

Low Hop Bing J:

Appeal

I **[1]** This is an appeal by the appellant-plaintiff ("the plaintiff") against the decision of the learned magistrate who had on 25 March 2004 dismissed the plaintiff's claim with costs.

Finding Of Facts

[2] Unless otherwise stated, after a full trial, the finding of facts by the learned magistrate may be unfolded as follows:

[3] The plaintiff has sold and delivered goods to a company known as Adco Sdn Bhd ("Adco") which has incurred an outstanding debt of RM379,761.21 due and owing to the plaintiff.

[4] In consideration of the sale and delivery of the goods thereof, *vide* letter of guarantee dated 24 May 1996, the defendant as Adco's managing director, together with another person, had jointly and severally guaranteed to pay the plaintiff to the extent of RM300,000 for any outstanding account and liabilities incurred by Adco.

[5] By way of Melaka High Court civil suit No. 22-52-2000 which was subsequently transferred to and registered as Kuala Lumpur High Court civil suit No. D6-22-1878-2000 ("the first suit"), the plaintiff claims the sum of RM379,761.21 and RM300,000 respectively against Adco and the defendant, in addition to interest and costs.

[6] The plaintiff also commenced Kuala Lumpur civil suit No. D2-22-1679-2000 ("the second suit") claiming a sum of RM300,000 together with interest and costs against the defendant. The second suit was based on the same cause of action in the first suit against the defendant.

[7] With a view to an amicable settlement, the plaintiff and the defendant had a meeting on 5 January 2001 ("the settlement meeting") wherein PJ Indah Sdn Bhd ("PJ Indah") of which the defendant was also the managing director had agreed to pay the plaintiff the sum of RM379,761.21 being the sum owed by Adco to the plaintiff, together with interest claimed by the plaintiff at 8%p.a. on the sum of RM379,761.21 from 8 July 1999 to 5 January 2001 which amounted to RM45,446.49.

[8] At the settlement meeting, the defendant was alleged to have orally agreed with the plaintiff's representatives *viz*. Madam Yong Le Chian and Mr. Lim Oui Kiong to pay a sum of RM20,000 to the plaintiff on or before 31 December 2001, by way of settlement of the interest owed by Adco to the plaintiff. The oral agreement was allegedly recorded in five letters dated 9 January 2001, 12 January 2001, 10 April 2001, 29 August 2001 and 6 September 2001 (collectively "plaintiff's five letters") issued by the plaintiff's

A solicitors to the defendant's solicitors, enclosing letters of admission and undertaking and setting out the terms of settlement for the abovesaid two suits, pursuant to which the sum of RM379,761.21 had been paid to the plaintiff and the two suits were withdrawn, but the defendant had failed to pay the sum of RM20,000 to the B plaintiff.

[9] On 25 February 2002, plaintiff's solicitors issued a notice of demand addressed to the defendant's address given by the defendant in the letter of guarantee. There was no response by C the defendant to the said notice of demand.

[10] Subsequently, when the plaintiff's action was dismissed by the magistrate, the plaintiff lodged this appeal.

Oral Admission And Undertaking

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[11] Mr. Wong Fook Meng, learned counsel for the plaintiff, submitted that there was an oral agreement between the defendant and the plaintiff to the effect that the defendant had admitted and undertaken to pay, *inter alia*, RM20,000 to the E plaintiff.

[12] The following cases were referred to:

(1) *Lim Keng Siong & Anor. v. Yeo Ah Tee* [1983] 1 CLJ 233; [1983] CLJ (Rep) 231 FC;

F

(2) *Sivapragasam Nagamany v. Amaravathy v Nadeson & Anor* [2001] 8 CLJ 706 HC; and

(3) *Ace King Pte. Ltd. v. Circus Americano Ltd. & Ors.* [1983] 2 CLJ 255; [1983] CLJ (Rep) 444 HC.

G

[13] Defendant's learned counsel Mr. Gobindran a/l Thirunavakarasu responded that the issue was whether there was an alleged oral agreement. He said that the sum of RM379,761.21 had been paid to the plaintiff, there being no such oral agreement or undertaking H by the defendant to pay the sum of RM20,000 now claimed by the plaintiff, adding that the alleged oral agreement cannot be proved by the plaintiff's five letters which were not from the defendant, and that the plaintiff's said claim was frivolous, vexatious and malicious.

I

[14] On the basis of the above submissions, I am of the view that the issue for determination under this head may be stated as follows:

> Upon evaluating the entire evidence adduced at the trial in the court below, on a balance of probabilities, has the plaintiff succeeded in establishing the existence of an oral admission and undertaking by the defendant to pay the plaintiff the sum of RM20,000 claimed by the plaintiff?

[15] In relation to the alleged oral admission and undertaking, the appeal record reveals that in the court below, the parties called one witness each.

[16] Plaintiff's witness (SP1) who was in charge of the plaintiff's business operations testified that the defendant was at the material time the managing director of Adco. On 5 January 2001, four persons *viz*. SP1, the defendant and two representatives from PJ Indah attended the settlement meeting. The date was arranged by the defendant. It was agreed that the sum of RM399,761.21 was to be paid to the plaintiff before the end of 2001, which was confirmed by the plaintiff's five letters to the defendant's then solicitors SM Kam & Associates of Batu 5 Jalan Kelang Lama 58200 Kuala Lumpur. A sum of RM379,761.21 had been settled by PJ Indah, while the balance of RM20,000 was to be paid by the defendant to the plaintiff by the end of 2001.

[17] Defendant SD1 who was the managing director of both Adco and PJ Indah testified in person to the effect that she was aware of the settlement meeting but denied she had ever agreed to pay the sum of RM20,000, adding that only the sum of RM379,761.21 had been agreed upon. Defendant denied having knowledge of the plaintiff's five letters, but admitted receiving a notice of demand dated 25 February 2002.

[18] The essence of the learned magistrate's grounds adverted to:

(1) the plaintiff's failure to call independent witnesses from PJ Indah in order to confirm the defendant's alleged admission and undertaking; and

(2) the plaintiff's withdrawal of the aforesaid two suits notwithstanding the defendant's non-execution of the letter of admission and undertaking.

[19] In relation to ground (1) above, I find that SD1 herself is also the witness from PJ Indah, as the managing director. SD1 was also the person who arranged for the date of the settlement meeting. It is reasonable to infer that she has full knowledge of the matters discussed and agreed thereat.

[20] A careful consideration of the learned magistrate's ground (2) leads me to the conclusion that he has focused on the requirement of a duly executed admission and undertaking by the defendant as a *sine qua non* for proving the plaintiff's claim. At this juncture, it needs to be noted that the plaintiff's cause of action is not based on a duly executed admission and undertaking. Plaintiff's pleaded case is founded upon an oral admission and undertaking by the defendant (see para 8 of the plaintiff's statement of claim) which the defendant has denied in para 6 of the defence. The duly executed admission and undertaking has never been part of the pleadings by which the parties are bound. The learned magistrate or any trial judge is legally bound to decide on the issues based on the pleadings and should not go beyond that: *Janagi v. Ong Boon Kiat* [1971] 2 MLJ 196; *The Chartered Bank v. Yong Chan* [1974] 1 MLJ 157; and *Yew Wan Leong v Lai Kok Chye* [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330.

[21] The existence or otherwise of an oral admission and undertaking is to be resolved by way of the discharge of burden of proof.

[22] Section 101 of the Evidence Act 1950 provides as follows:

101 Burden of proof

(1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

[23] As the plaintiff desires the court below to give judgment as to the legal right or liability, dependent on the existence of facts which he asserts in relation to the existence of an oral guarantee, the plaintiff must prove that those facts exist, in accordance with s. 101(1). Under s. 101(2), the burden of proof lies on the plaintiff (see also *MBf Finance Bhd v. Sim Peng Bee & Anor* [2003] 1 CLJ 690 HC; *Tenaga Nasional Berhad (Formerly Lembaga Letrik Negara*

Tanah Melayu) v. Perwaja Steel Sdn Bhd (Formerly Perwaja Terenggnu Sdn. Bhd.) [1995] 4 CLJ 670 HC; and *Nuri Asia Sdn Bhd v. Fosis Corporation Sdn Bhd* [2006] 5 CLJ 307 HC.

[24] As this is a civil case, the burden of proof may be discharged by the plaintiff on a balance of probabilities ie, that the plaintiff's version is probably true.

[25] As the evidence adduced by the parties respectively pertaining to the existence or otherwise of an oral admission and undertaking is sharply conflicting, the learned magistrate should have followed the safer approach set out for the Federal Court by Chang Min Tat FJ (as he then was) in *Tindok Besar Estate Sdn. Bhd. v. Tinjar Co.* [1979] 2 MLJ 229 ie, to refer to and rely on the witness' acts and deeds which were contemporaneous with the event and to draw reasonable inferences from them, adding that judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and circumstances of the case.

[26] The above approach was also applied by James Foong J (now JCA) in *Industrial Concrete Products Bhd v. Concrete Engineering Products Bhd & Other Suits* [2001] 8 CLJ 262 and by me in *Nuri Asia Sdn Bhd, supra*.

[27] However there was no indication in the magistrate's grounds of decision that this was done.

[28] On my part, it is significant to note that after the settlement meeting, the plaintiff's solicitors had written to the defendant's then solicitors on 9 January 2001 to confirm the terms of the settlement contained in the annexed letter of admission undertaking and to execute before the defendant's solicitors. The terms of settlement include *inter alia* the sum of RM399,761.21 out of which Adco was to pay RM397,761.21 and the balance of RM20,000 was to be paid by the defendant.

[29] On 12 January 2001, *vide* the second letter issued by the plaintiff's solicitors to the defendant's then solicitors, the plaintiff's solicitors confirmed the teleconversation between the plaintiff's solicitor Miss Ng Geok Kuan and defendant's solicitor Mr. Kam in relation to the defendant's admission and undertaking. The plaintiff's solicitor had forwarded three copies of the defendant's

admission and undertaking, with the words "end of the year 2001" in para 3(ii) therein to be replaced by the words "on or before 2001".

[30] *Vide* the third letter dated 10 April 2001, plaintiff's solicitors Mr. Wong Fook Meng confirmed the teleconversation with the defendant's solicitors Mr. Kam on the same subject matter requesting the defendant's solicitors to advise the defendant to execute the same on or before 30 April 2001.

[31] The fourth letter dated 29 August 2001 issued by the plaintiff's solicitors to the defendant's then solicitors confirmed that the settlement cheques amounting to RM379,761.21 in respect of the first suit had been cleared and that the balance sum of RM20,000 was to be paid by the defendant on or before 31 December 2001, for which the defendant has to execute the letter of admission and undertaking.

[32] The fifth letter dated 6 September 2001 from the plaintiff's solicitors to the defendant's then solicitors confirmed that the defendant had agreed to pay the sum of RM20,000 on or before 31 December 2001.

[33] Neither the defendant's solicitors nor the defendant had ever disputed, objected to or derogated from any of the plaintiff's five letters. The defendant has however declined to execute the letter of admission and undertaking. Notwithstanding this, it is also significant to note that PJ Indah, of which the defendant was the managing director, had pursuant to para 3(i) of the unexecuted letter of admission and undertaking paid the sum of RM379,761.21 which was part and parcel of the sum of RM399,761.21 in para 2 thereof, leaving a balance of RM20,000 to be paid by the defendant to the plaintiff on or before 31 December 2001 pursuant to para 3(ii) thereof.

[34] Apparently, there was a change of mind by the defendant when the two suits were withdrawn by the plaintiff on 17 April and 4 September 2001 respectively. From the defendant's acts and deeds, it is a reasonable and indeed an irresistible inference that the said payment by PJ Indah was part and parcel of the larger package contained in the unexecuted letter of admission and undertaking which included the payment by the defendant of the balance of RM20,000 so as to treat the settlement as a whole. The defendant's admission and undertaking remains unaltered. The

defendant's refusal to sign the letter of admission and undertaking means that it is now oral in nature but which is nonetheless legally binding on the defendant.

[35] The following three authorities would fortify the proposition expounded by me above.

[36] In *Lim Keng Siong, supra*, the defendants had indicated their wish to dispose of land in Melaka at S$5.40 per sq. ft. for which they had appointed a registered estate agent. Further telephone negotiations had brought down the agreed price to S$5.20 per sq. ft. and the defendants had appointed a firm of solicitors in Melaka to deal with all legal matters pertaining to the above sale. This oral negotiation was confirmed by the letter from the registered estate agent to the defendants who or whose solicitors have neither objected to or derogated from. The defendants subsequently refused to complete the agreement and the plaintiff applied for specific performance. The issue was whether there was a concluded contract of sale at the orally agreed price of S$5.20 per sq. ft. In a well considered judgment, Wan Yahya J (later SCJ) gave the answer in the affirmative. On appeal, the Federal Court through the judgment of Abdul Hamid FJ (later CJ Malaysia) affirmed the High Court judgment, and held at p 49I left to p 49A right *inter alia* that the mere fact that a written contract had to be drawn up and executed by them did not necessarily mean that there was no legally binding and enforceable agreement.

[37] In *Sivapragasam, supra*, the facts reveal that in 1960 the plaintiff's father, N since deceased, had purchased property from its legal and beneficial owners M and L. As the parties to the purchase were close relatives, no formal documentation was prepared or executed in respect of the transaction. M and L undertook to transfer the property to N, but M died in 1966, after which the property was transferred to L upon L's undertaking to transfer it to M, which was not done. Till M's death in February 1973 and L's demise in March 1973, the property remained in L's name. Subsequently Mrs M approached the first defendant who was one of the administratrixes of L's estate and who had orally agreed to transfer the property to Mrs M upon letters of administration being extracted and the necessary orders obtained. Further to the promise, in February 1974, the first defendant instructed a solicitor to prepare an agreement to transfer the property to Mrs N. which the solicitor did. However, in September 1974, the first defendant withdrew

her verbal undertaking to transfer the property. Mrs. N relied on O. 81 r. 1(1)(a) of the Rules of the High Court 1980 and sought *inter alia* specific performance of the first defendant's oral promise. The defendants argued that if at all there was an agreement, it was unenforceable in law.

[38] PS Gill J (later FCJ) granted an order in terms, rejecting, at p 716g, the defendant's argument as totally misconceived, and holding, at p 718h, that the draft agreement prepared by a solicitor between Mrs N and the first defendant containing the agreed salient features, albeit not executed, more than sufficed for a concluded contract.

[39] The third and final authority is *Ace King Pte Ltd, supra,* where the plaintiffs' claim was based on an agreement between the plaintiffs and the defendants. The terms thereof had been agreed upon but the contract between them had not been signed. Zakaria Yatim J (later FCJ) held that a contract had been concluded, referring to *Chitty on Contracts,* 24th edn., vol 1, p. 102 para 100.

Conclusion

[40] On the foregoing grounds, I hold that the learned magistrate had erred in arriving at his decision. I therefore allow this appeal with costs, set aside the said decision, and enter judgment in terms of the plaintiff's claim.